THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

THE SPECIAL COMMITTEE on Atomic Energy, Oscar M. Ruebhausen, Chairman, had as guests Hanson Blatz, Chief Radiation Branch, Health and Safety Laboratory, United States Atomic Energy Commission, New York Operations Office; Saul J. Harris, Associate Radio-Physicist, Division of Industrial Hygiene, New York Department of Labor; and Edward Wiggin, Director of Technical Information, Atomic Industrial Forum. Discussion at the meeting was on the relation of the Atomic Energy Act of 1954 to matters of health and safety.

MEMBERS OF the Committee on Foreign Law, Willis L. M. Reese, Chairman, and the Committee on International Law, John V. Duncan, Chairman, held a reception in April for lawyers associated with various delegations to the United Nations and with the Secretariat.

THE CO-CHAIRMEN of the Attorney General's National Committee to Study the Antitrust Laws, The Honorable Stanley N. Barnes and Professor S. Chesterfield Oppenheim, spoke before a capacity audience in the meeting hall on the report of the Attor-

ney General's Committee. The meeting was sponsored by the Section on Trade Regulation, of which John E. F. Wood is Chairman.

THE COMMITTEE on Taxation, John H. Alexander, Chairman, adopted the following resolution which was transmitted to the Secretary of the Treasury:

> WHEREAS, Section 10.2(f) of Treasury Department Circular 230 provides that nothing contained in the relevant regulations shall be construed as authorizing persons not members of the bar to practice law; and
>
> WHEREAS, it has been suggested that such provision be deleted from the Circular or modified; and
>
> WHEREAS, it is believed that the interests of the Department and the public will be best served by preservation to the several States of their rights and powers to regulate the practice of law;
>
> NOW, THEREFORE, be it
>
> RESOLVED, that the Committee on Taxation of The Association of the Bar of the City of New York recommends against the adoption of the proposals for a change in substance in existing provisions of Treasury Department Circular 230 that nothing contained in the relevant regulations shall be construed as authorizing persons not members of the bar to practice law.

"DOING BUSINESS ABROAD" was the subject of a panel discussion sponsored by the Section on Corporate Law Departments, E. Nobles Lowe, Chairman. Speakers were Austin T. Foster, Moderator, General Counsel, Socony-Vacuum Oil Company, Inc.; Mitchell B. Carroll; Charles R. Carroll, formerly General Counsel for Overseas Division of General Motors Corporation; and Victor C. Folsom, Foreign Counsel, Sterling Drug, Inc. John

H. Mathis, Vice President and Secretary, Lone Star Cement Corporation, presided.

AMONG other projects under consideration by the Committee on Law Reform, George G. Gallantz, Chairman, are proposals to amend Section 18 and Section 124 of the Decedent Estate Law; a proposal for the establishment of a public defender in New York City; and a proposal for the repeal of the statutes dealing with civil arrest and body execution.

THE LEGISLATURE adopted for the second time the joint resolution, sponsored by the Committee on Law Reform, George G. Gallantz, Chairman, for an amendment to the Constitution to prohibit judges from running for non-judicial office. The bill was reintroduced by Senator Williamson, S. Int. 31, Pr. 31, and by Assemblyman Morgan, A. Int. 1333, Pr. 1352. The proposed amendment will appear on the ballot this fall.

A bill sponsored by the Committee on Legal Aid, Woodson D. Scott, Chairman, which authorizes assigned counsel compensation on appeal as of right from judgment of life imprisonment on the recommendation of the jury was passed. The bill was introduced by Senator Mitchell, S. Int. 1904, Pr. 2012, and by Assemblyman Wilson, A. Int. 2305, Pr. 2376.

The Special Committee on Improvement of Family Law, Richard H. Wels, Chairman, succeeded, in cooperation with other civic groups, in securing a legislative hearing on the Gordon bill, which would establish a temporary commission to study problems relating to the administration of family law. Following the hearing the bill was reported out in the Assembly, where it was defeated by 20 votes.

Two bills sponsored by the Committee on Real Property Law, Albert W. Fribourg, Chairman, did not pass. One related to the distribution of the proceeds of fire insurance policies and the rights of mortgagor and mortgagee with reference to the repair of fire damaged premises. The second provided that possession or occupancy of real property should not operate as notice of an

existing or future right. A third bill sponsored by the Committee passed both Houses. This legislation permits the opening of defaults in foreclosures of tax liens by actions in rem.

IN APRIL the President and the Committee on Criminal Courts, Law and Procedure, Arnold Bauman, Chairman, entertained the Justices of the Court of Special Sessions and the City Magistrates. Mayor Wagner and Commissioner Adams were present and spoke briefly, as did Chief Justice Cooper and Chief City Magistrate Murtagh.

OTTO C. SOMMERICH presided over a debate, "To Return Or Not To Return, That Is The Question," sponsored by the Committee on Foreign Law, Willis L. M. Reese, Chairman. Rudolf M. Littauer spoke in favor of the return of confiscated German property. He was opposed by Cecil Sims of the Nashville Bar.

THE COMMITTEE on Aeronautics, Theodore E. Wolcott, Chairman, has prepared a draft report on the proposals to review the Warsaw Convention as they affect passengers' personal injuries and death claims. The report when adopted by the Committee will be transmitted to the State Department.

THE OPENING of the annual art show took place on May 3. David M. Solinger was Chairman of the Subcommittee in charge of the show. Lloyd Goodrich acted as consultant to the Committee.

IN THE May issue of Harper's Magazine there is an article by Richard H. Rovere entitled "The Kept Witnesses" which discusses the Matusow case and the problem of professional witnesses in general.

The Calendar of the Association for May and June

(As of May 3, 1955)

May 2 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Law Reform
Dinner Meeting of Committee on Professional Ethics

May 3 *Opening of Annual Art Exhibition, 4:30 P.M.*

May 4 Dinner Meeting of Executive Committee
Meeting in Memory of Augustus Noble Hand
Meeting of Section on Wills, Trusts and Estates

May 5 Meeting of Section on Taxation

May 9 Meeting of Committee on City Court
Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Post-Admission Legal Education

May 10 *Annual Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*

May 11 Dinner Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Studies and Surveys of Administration of Justice
Dinner Meeting of Committee on Surrogates' Courts

May 12 Dinner Meeting of Committee on Atomic Energy
Dinner Meeting of Committee on Insurance Law
Luncheon Meeting of Committee on Copyright
Dinner Meeting of Committee on Copyright
Forum "What's Happening in the Insurance Business," 8:00 P.M. Sponsorship Committee on Insurance Law
Meeting of Section on Labor Law

May 16 Meeting of Library Committee

May 18 Meeting of Committee on Admissions
Meeting of Committee on Arbitration
Dinner Meeting of Committee on Bill of Rights

May 23 Joint Meeting of Section on Corporate Law Departments and Section on Corporations
Dinner Meeting of Committee on Military Justice

May 24 *Arbitration Symposium*
Dinner Meeting of Committee on Arbitration

May 25 Dinner Meeting of Committee on Aeronautics
Annual Dinner of Committee on Round Table Conferences

May 26 Dinner Meeting of Committee on Admiralty

June 6 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Professional Ethics

June 7 Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and Trade-Marks

June 8 Dinner Meeting of Executive Committee

June 15 Meeting of Committee on Admissions

Some Comments on the Trial of a Criminal Case

By Newman Levy

To those lawyers who insist that they would not know how to try a criminal case if they got one, let me say that it is essentially little different from trying a civil case. The rules of evidence, for the most part, are the same; the techniques of courtroom strategy and cross-examination are the same; and advocacy is advocacy in any court.

A competent trial lawyer will go from negligence to libel to divorce with unhesitating confidence. He learns the rules and differences as he goes along. There is no reason why he could not take on a criminal case with equal assurance if the fee were attractive enough and he was not restrained, as many lawyers are, by the absurd belief that criminal practice is *declassé*.

PRE-TRIAL PROCEDURE

One of the differences between a criminal and civil case is that our criminal practice gives the defendant lamentably little help in pre-trial preparation. The Federal Rules of Criminal Procedure have made advances in the right direction, but in the state courts of New York there has not only been slight progress, but, in my opinion, a regression.

A defendant charged with a felony is given a copy of the indictment. Under the simplified pleadings approved some years ago this tells him little more than he already knows. A typical murder indictment, for instance, reads as follows:

Editor's Note: Mr. Newman Levy, presently a member of the Executive Committee, has also served as a member of the Association's Committees on Entertainment, Criminal Courts, Law and Procedure, and Professional Ethics. Mr. Levy has long been interested in the administration of criminal law and has had a wide experience in the trial of criminal cases.

> The Grand Jury of the County of New York, by this indictment accuse the defendant of the crime of Murder in the First Degree, committed as follows:
>
> The defendant in the County of New York, on or about June 2, 1953 wilfully, feloniously, and of malice aforethought, struck and killed John Doe with a knife.

That is all. This form of indictment has been sustained by the Court of Appeals, and it does not tell the defendant much. Perhaps it is tacitly assumed by the prosecuting authorities that since he is probably guilty the defendant knows more about the case than the Grand Jury and does not need to be told anything more.

Some years ago it was required to write on the indictment the names of the witnesses who testified before the Grand Jury, but this eminently fair provision has been abolished. Now a defendant gets just the bare indictment and has to guess who his accusers were.

A defendant can make a motion for a Bill of Particulars to amplify the indictment, but the courts are somewhat parsimonious in granting particulars. However, the motion should be made. Whatever additional information is given is so much gained. A Bill of Particulars can be quite important in a case in which there is to be an alibi defense and it is necessary to pin the district attorney down to specific times and places.

I had a murder case a few years ago in which it was important for the defense to know the results of blood tests on the defendant's clothes. I asked the assistant district attorney to show me the serological report. He said that he did not think he had authority to do so.

I thereupon made a motion to compel him to show me the report. The judge called me up to the bench. "I think you ought to have it," he said, "but I don't want to create a precedent. We'd be pestered to death by all sorts of motions if we started this sort of thing. Why don't you withdraw your motion and I'll ask the district attorney to give it to you."

I withdrew my motion and I got the report. It was very helpful.

It is evident from this episode that practice in the criminal courts is largely improvised. These preliminary applications are not reviewable, and pre-trial assistance is sometimes granted as a favor when it should always be granted as a right. Such things as autopsies, police reports, photographs and diagrams should be given to the defendant upon request in all cases. I would add, also, books and records, and, in most instances, correspondence.

There is another preliminary motion that should be mentioned, a motion for an inspection of the Grand Jury minutes. This motion is so rarely granted that ordinarily it is a futile gesture to make it. The sole purpose for which the minutes are ever granted is to predicate upon them a motion to dismiss the indictment because of some defect or deficiency in the evidence before the Grand Jury. This purpose must be alleged in the moving papers. The minutes are never granted just to enable a defendant to prepare his case for trial.

Since the proceedings are secret the defendant has to guess or speculate what occurred before the Grand Jury. He has to tell the judge, in affidavits, his guess as what is in the testimony so that the judge can decide whether to let him know what actually is in it. It sounds a bit silly, but that is the way it is done. The usual practice nowadays is for the judge to say, "I will read the minutes myself," which he does, and then usually denies the motion.

In the days when the names of witnesses were indorsed upon the indictment it was the practice of many experienced lawyers, in support of a motion to inspect, to get affidavits if possible from the witnesses as to what they had testified before the Grand Jury. This is perfectly proper, although the district attorney often did not think so. The law forbids a juror to disclose what was testified to before a Grand Jury, but this prohibition does not apply to witnesses.

I want to say here that there is no such thing as a prosecutor's witness or a defendant's witness. All witnesses in a criminal case are witnesses to the facts. It is not only the right of the defense, it is its duty to interview every witness who can help in the preparation for trial. Getting them to talk is something else again, but it

should be tried in spite of the proprietary claims of some assistant district attorney.

The adversary nature of our trials is too deeply rooted to be drastically changed, but there are requirements of fair play that should afford a defendant as much help in preparing his case as may be possible without jeopardizing the interests of the community. This is especially true of a defendant of limited means who is pitted against the vast resources of the prosecutor and the police department.

It has been my experience that a lawyer who is known to be a reliable, honest practitioner can usually get a lot of pre-trial information unofficially from the prosecutor. It is my invariable practice, when I get a criminal case, to pay a visit to the assistant district attorney in charge to talk the matter over.

This is a procedure that is not sanctioned by statute or rule, but it is of inestimable value to both sides. Clients often lie to their lawyers, and it takes many laborious interviews to batter down their suspicions and get at a kernel of truth. The assistant district attorney, when I visit him, usually tells me more about my case than I could learn in any other way. Sometimes he lets me read the typewritten statements of witnesses, prefacing it with the flattering statement, "Of course I couldn't do this for everyone, but I know I can trust you."

This informal practice works wonders as a time saver and in bringing about a disposition of cases. Many a defendant has stubbornly protested his innocence to me and insisted upon standing trial, only to be confuted subsequently by facts of his case that were told to me by the prosecutor, and that he could not dream that I knew. This has often resulted in the defendant's acceptance of a plea to a lower degree than that charged in the indictment, and a correspondingly lighter sentence.

It would aid the administration of criminal justice if this voluntary procedure were formalized into some sort of pre-trial procedure held before a judge, comparable to what goes on in the civil courts. I may say, as one who has been the beneficiary of this sort of disclosure, that I can recall no case in which the interests of

either the People or the defense have been hurt by preliminary candor.

There is one method of examination before trial that is authorized in criminal cases, and a defendant is wise to avail himself of it when he can. This is the examination in the Magistrate's Court. If a case is not presented to the Grand Jury in the first instance a defendant is entitled to a preliminary hearing. He may know that he is going to be held for trial anyway but he has nothing to lose by first subjecting the prosecution's witnesses to as thorough a cross-examination as the magistrate will permit before waiving further examination. He may learn much to his advantage, and the minutes are often of great value on cross-examination at the trial.

PICKING A JURY

The first stage in a criminal trial is the selection of a jury. Much has been said and written about the art of picking a jury, and perhaps it is an art, but I have never understood it. My father, who tried many criminal cases, used to say that it was one of the most important parts of a trial. I assisted him in cases in which he took as much as a week or ten days. My own inclination is in favor of brevity.

In the ordinary criminal case twelve talesmen are put in the box and are examined collectively; as one is challenged another is substituted until the jury is chosen. In more important cases talesmen are examined on the *voir dire*; that is, one talesman is placed in the witness box and after being questioned individually is either accepted or rejected.

It is customary for lawyers to ask prospective jurors whether, if they are accepted, they will give the defendant a fair and impartial trial. This is giving lip service to an amiable legal fiction. No lawyer wants an unprejudiced jury. He wants one that is prejudiced in his favor. This, regrettably, applies as well to the prosecutor who, in theory at least, is a quasi-judicial officer.

Some lawyers are gifted with a hypnotic charm and persuasiveness. They believe that the constant iteration of "reasonable

doubt," "burden of proof," and "presumption of innocence," has the same conditioning impact as a cigarette slogan. They may be right, but I never have been convinced of it, and jurors to whom I have spoken have confirmed my opinion. Father used to think that the time he spent in picking a jury was well spent. He was engaged, from the very first question, in a subtle indoctrination in bias. It may be a good trick to try if a lawyer is sure of his powers; otherwise it is a risky business. The cardinal rule in trying jury cases is: Never bore the jury.

Of course, a lawyer must try to ascertain whether actual or possible bias exists. Such questions as whether a talesman knows anything about the case and has formed any opinion about it, whether he is acquainted with anyone connected with it including witnesses, police officers, and members of the prosecutor's staff, and whether he has any prejudice against members of a particular race, nationality, or religion—these and similar matters have to be explored, but the job need not take days.

I think that the practice in the federal courts of having the judge interrogate the jury is preferable. The first time I experienced it I was resentful; I felt that one of my cherished prerogatives had been taken from me. After I got used to it I came to the conclusion that it made little difference. In spite of the difference in method of selection it has seemed to me that the juries in the federal courts are about the same as in the state courts. I spoke recently to a prominent English barrister who has been trying cases for more than thirty years. He told me that in that time he has never had a case in which a talesman was challenged.

There is one glaring fault, perhaps it is an occupational disease among lawyers, that I have observed for years. They talk too much, and nowhere is this weakness more evident than in empaneling a jury. The purpose of questioning a talesman is to find out about *him,* not to have him find out about you. Yet I have repeatedly heard lawyers indulge in a continuous flow of eloquent questions for a half hour or so and receive curt monosyllables in reply.

If you feel that you must question the talesmen, draw them out.

For more than forty years, in virtually every criminal case I've listened to, I've heard this question asked: "If you are accepted as a juror in this case will you apply the law as given to you by the Court?" I have yet to hear a talesman say that he would refuse to obey the judge's instructions.

Many lawyers play hunches in picking a jury. They have sublimated their amateur psychological deductions into a code of precepts. One eminent lawyer I know will not take men with beards. Another bars writers and musicians. Some dislike women jurors and others try to get them. It is a pleasant, amusing game with about as much validity as a system for beating the roulette wheel, but if it affords counsel any satisfaction, by all means, go ahead.

My own belief is that the only sound basis for judging a prospective juror is the intuitive knowledge of human nature that comes from years of experience. If I feel that a talesman and I are sympathetically attuned, I take him. At that, there have been occasions when my intuitions have been proven to be not entirely reliable.

After a jury is empanelled be sure to ask that all witnesses be excluded from the court room. This is most important. Many judges will make the direction unasked, but be sure to ask it if the judge forgets. It is most disconcerting for a defense lawyer, after he has put a witness through a devastating cross-examination, to see several of the prosecution's witnesses sitting in the front row, drinking it all in, mentally editing their testimony to conform to what they just heard.

THE OPENING

The prosecutor is required by law to outline his case at the beginning of a trial. After that the defense lawyer may make an opening statement if he wants to or he may waive. It is my opinion that in most cases an opening for the defendant does not help much, and sometimes it may hurt. One reason is that the defendant's lawyer frequently does not know what his defense may be, or whether he will put in any defense at all.

The prosecution has the burden of proof and has to prove the defendant's guilt beyond a reasonable doubt. Occasionally it fails to sustain the burden and the defense is faced with the risk of supplying the defects in the prosecution's case. Sometimes there are surprises or testimony that could not be anticipated which require a revision of the defense strategy.

An opening address is a commitment to the jury; it is a pledge that certain things will be established. If the lawyer, often for perfectly good reasons, does not fulfill his commitment the jury may suspect all sorts of sinister motives.

Unnecessary openings are often born of a lawyer's unquenchable desire to make a speech. If he prudently restrains his eloquence he will have ample opportunity to orate when he sums up at the end of the trial. However, if he must talk let him stick to generalities such as the presumption of innocence and the burden of proof. But beware of the facts—at least until the facts are known.

THE TRIAL

I said at the start that there is essentially little difference between a civil trial and a criminal trial. This is true enough mechanically, but there are inevitably overtones of emotion and intensity in a criminal case that ordinarily are absent from the civil courts. Even the simplest criminal trial is played in an atmosphere of drama, often melodrama.

This adds to the difficulty of the trial lawyers task. The tradition of flamboyant advocacy is outmoded in our courts. Purple patches of eloquence and emotional outbursts do not go well with modern, urban jurors; they have been conditioned by too many plays, movies, and television shows. Just the same, histrionism is as important today in a criminal case as it ever was, but it must be keyed to the current fashion for naturalism. This can be learned only by study, practice, and experience.

A lawyer, needless to say, should never be unnecessarily obstructive. However, in a criminal case the burden is on the prosecutor to prove his case, and it is my belief that he should be held

strictly to his obligation. One never knows, under our adversary practice, what gaps or weaknesses may be revealed in the prosecution's case. A defense lawyer should be extremely cautious about making concessions. He may find that by an excess of courtesy he has conceded his client into state's prison.

Of course this can be carried to absurdity. I once prosecuted a bigamy case in which the bigamous marriage had been performed in the Municipal Building. The defense lawyer contended that I had failed to prove jurisdiction, and I was obliged to subpoena the County Clerk to testify solemnly under oath that the Municipal Building is in the County of New York. However, it is a good rule to make the district attorney prove every element of his case. He may not be able to do it.

So much has been written about the examination and cross-examination of witnesses that I will content myself with just one or two observations:

Don't make exhaustive notes of the direct examination. This is based not only upon my own experience, but upon the experience of many better lawyers than myself. A trial lawyer's job is to keep his eye constantly on the witness and to hear and observe everything that takes place in the witness box. He can't do this if he's busy transcribing the testimony.

Don't object more than is absolutely necessary. Jurors don't like it. Of course, timely objections are important, but I consider it one of the essential attributes of a good trial lawyer to know when not to object. Recently I read the transcript of a case that was tried by an excellent lawyer. If he had insisted upon strict observance of the rules of evidence he was taught at law school he would have been on his feet objecting to every other question. Instead, he was silent throughout his client's entire cross-examination. It was a good job of advocacy.

There are no hard and fast rules. Each case will depend upon its own facts and atmosphere. A good jury lawyer will know how to handle himself whether the case is civil or criminal. There is one rule of my own that I think has even more importance in a criminal trial than in a civil. Shun humor like the plague! My

reason is that the odds are a thousand to one that you will be no good at it. One of the most prevalent of all forensic psychoses is the delusion of wit. I do not have the pleasure of knowing you, brother barrister, but my guess is that you are not one of the rare, gifted ones.

It is especially dangerous to indulge in humor in a criminal case where liberty or life is at stake. The issues are too grim for incongruous flippancy; it is like whistling at a funeral. Remember, you are there for the purpose of prejudicing the jury, so beware that you don't prejudice it against you.

When he reaches the defense the most important decision a lawyer has to make is to whether or not to put his client on the stand. It is true that no presumption may be created against a defendant who refuses to testify. The prosecutor may not comment on it, nor may the judge unless he is specially requested by the defense to do so.

Nevertheless, in spite of all safeguards, a prejudicial presumption is bound to arise. Jurors have brains, and consciously or unconsciously, they are sure to ask themselves, If this fellow is innocent why doesn't he get up there and say so? For this reason many leading lawyers in England vigorously opposed granting the privilege to defendants to testify in their own behalf when the law was changed in the Eighteen-seventies. Before that they could say, "My client might give a good explanation of all this, but unfortunately the law has sealed his lips." What they feared might happen by the change has happened.

The decision whether to call the defendant is determined by practical considerations, upon a balancing of possible dangers. If a defendant has a previous criminal record that fact cannot be brought out unless he becomes a witness, and then only to impeach his credibility. (This, by the way, is one of the most absurd psychological fallacies in our rules of evidence.)

In a doubtful case proof of a prior record (which the judge must charge has no bearing upon the defendant's guilt or innocence) might very well tip the scales in favor of conviction. On the other hand the defendant might have a plausible story

that could possibly swing the jury in his favor in spite of his record. The decision is a hard one, and every criminal lawyer has, time and again, gone through the agony of making it.

Ordinarily, if a defendant has no record I should say that he ought to testify. The jury wants to hear him, and his appearance in the box will dissipate that improper but inevitable presumption I have mentioned. But this, too, depends upon the case. It may be, as his lawyer knows, that he will be a vulnerable witness, that the prosecutor has cross-examination ammunition that will supply the defects in what otherwise might be a weak case. The decision is, in any event, a hard one, but we have scriptural authority for the fact that the way of the transgressor is always hard.

I have spoken as if the determination whether or not to have a defendant testify rests with the lawyer. This is not quite so. He should give his client the benefit of his advice and experience, but the ultimate decision must be made by the defendant, and the defendant alone.

Whatever conclusion is reached it is a wise precaution to have the defendant state it to his lawyer in *writing:* "I wish to testify in my own behalf," or "I do not wish to testify in my own behalf." Criminals are not always the most veracious people nor the most grateful, especially after a verdict has gone against them.

REBUTTAL AND SURREBUTTAL

Strictly speaking, rebuttal should be limited to rebutting matter brought out in the defense, and the prosecution should not be allowed to introduce evidence on a new topic. Nevertheless, since judges are allowed wide discretion in conducting criminal cases, new matters do sometimes appear at the end of a criminal trial. There is nothing much a lawyer can do about it except object and take an exception.

However, a word of caution should be given. One witness usually leads to another, and there is a grave temptation, at this late stage of the proceedings, to answer each new bit of evidence by additional rebutting testimony. Don't yield to it unless the

new evidence actually hurts. Since a fair judge will give a defendant every opportunity to present anything he may deem relevant, the conclusion of a trial sometimes trails off into fragmentary bits of evidence of no great consequence. This often involves dangers.

There is a curious phenomenon I have observed. I can't explain it, but I have seen it happen so often that it can be accepted as a rule of trial practice. I have rarely known a witness to be recalled to the stand by the defense who did not weaken his original testimony. This is particularly true if the witness is the defendant. Every trial lawyer's experience contains an anthology of regrets. Among the most poignant are memories of the defendants who were finished with their testimony and who were recalled to the stand for just one or two short questions.

Whenever a client of mine testifies I am in a state of nervous tension until he leaves the witness box. This is true whether he be guilty or innocent. Of course, if anything really damaging is subsequently brought out it has to be answered. But the hazards of recalling a witness to clear up minor discrepancies far outweigh the advantage gained. An experienced trial lawyer should know when his record is in satisfactory shape. Except in a case of clear necessity, when you have rested your case let it stay rested. I have seen many fatalities result from violating this rule.

SUMMATION

No trial lawyer needs to be told how to sum up. Ours is an oratorical profession and every advocate believes, in the inner recesses of his heart, that he is a lineal descendant of Demosthenes and Cicero. However a few observations applicable to criminal trials should be noted.

Don't, if you can possibly avoid it, sum up unless your adversary is going to sum up on the same day. He already has a decided strategic advantage in having the last word; it is manifestly unfair to give him the additional advantage of studying your argument and the minutes over night in order to prepare his reply.

Furthermore, it is not well to have the persuasiveness of your speech fade from the jurors' minds and to have them retire to deliberate with the voice of the district attorney still ringing in their ears.

In a protracted case the judge, who undoubtedly once tried cases himself, will be fair about this even though the testimony may close in the morning. In a shorter case a lawyer cannot always avoid summing up immediately. In such event it is wise to keep track of time and cut the speech short, even at the sacrifice of a few forensic gems, so that the prosecutor will have to start speaking as soon as defense counsel sits down.

The form and content of a summation, and the method of delivery depend upon the advocate's skill. Don't minimize the importance of it. The summation is, to borrow a legal phrase, the defendant's last clear chance. Many cases have been won by it—or lost.

Logical presentation is the essence of advocacy, but I do not say that an occasional excursion into tear-jerking is not sometimes warranted. If the evidence against his client is convincing an emotional appeal may be the only device left to the lawyer. But it should be used with caution, especially since the prosecutor and the judge are sure to tell the jury that sympathy is something the law has placed outside their province.

I consider it most important, in a closing address, to pound away with all the emphasis possible on burden of proof, presumption of innocence, and reasonable doubt. These are the standards by which the jury is to measure the evidence. The judge, of course, will charge these rules, but somewhat perfunctorily and, occasionally, unintelligibly. It is essential that counsel impress them indelibly upon the minds of the jurors.

Incidentally, I prefer to tell a jury that the prosecution has to satisfy them "to a moral certainty" of the defendant's guilt. I do not know what these words mean, but they have the approval of high authority, and they sound as if they imposed a heavier burden of proof upon the prosecution than merely "beyond a reasonable doubt."

I have a few private prejudices of my own that I will mention for what they are worth. I have pointed out that flamboyance has gone out, and that naturalism is now the vogue. Cases are not won by decibels. Remember that you are addressing twelve men and women who are seated two feet away from you, not a mass meeting in Madison Square Garden.

Another prejudice of mine is the peripetetic orator who paces up and down before the jury box. The arrangement in the English courts of having the barristers seated on tiers of benches accounts somewhat, in my opinion, for their more polished and urbane style. However, if a lawyer feels an urge to combine exercise with oratory I would be the last one to deny him that pleasure.

When the district attorney sums up listen attentively to every word. If he misquotes testimony or makes a prejudicial, inflammatory statement, and such things have been known to happen, the time to object is right then, not at the end of his speech.

No decent lawyer, of course, will interrupt his opponent without sufficient cause. But if the offense is flagrant it is a lawyer's duty to break in with a timely objection or even a motion for a mistrial. In so doing he will not only be fulfilling his professional obligation, but he will be enabled to get in a last lick which our benign procedure otherwise denies him.

The judge then will instruct the jury, the jury will retire, and your case is on the knees of the gods.

The Work of the President's Conference on Administrative Procedure

By The Honorable E. Barrett Prettyman

The President's Conference on Administrative Procedure really began several years ago, when the Judicial Conference of the United States became concerned about the expense, the delay, and the volume of the records in some kinds of cases, judicial and administrative. It appointed a committee of ten judges to look into the alleged difficulties. The subject fell naturally into two parts, judicial procedure and administrative procedure. After two years work the judges, in 1951, made a report respecting protracted judicial proceedings. That report was adopted by the Conference and was circulated to all federal judges and to the bar. It was concerned with the so-called "Big Case," in which exhibits run into hundreds, even thousands, and pages of record are as many as seventy thousand. These cases are not numerous, but one of them can disrupt a court calendar. The report contains detailed suggestions—forty pages of them—about the procedural phases of a protracted trial. Its teaching is that a trial involving many people and masses of material can be conducted efficiently only by the method necessarily used to handle efficiently any other operation involving many people and masses of material; that is, by preliminary organization. You cannot build a big building without a blueprint, or stage a big show without a program, or move a body of troops without a timetable. And you cannot try efficiently a protracted lawsuit unless you organize it, or cause it to be organized, in advance. It must be organized as to counsel, as to witnesses, evidence, documents, as to times and

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places and parts to be played. A judge who permits one of these cases to go to formal trial without first making sure that the issues are understood, that counsel are prepared, that the documentary material has been expurgated, identified, authenticated and arranged, and that a definite working schedule has been set up, lets himself in for a vast amount of unnecessary delay, confusion, expense, volume of record, and probable inaccuracy. He might as well start out to drive from Hot Springs, Virginia, to Coos Bay, Oregon, without a map, a reservation, or a compass. He would probably get to his destination eventually, but he certainly would not get there efficiently.

These judges on the Judicial Conference committee were of the opinion that, while they might be equipped with ideas concerning the judicial process, administrators might have more and better ones concerning administrative processes. An advisory committee, composed of members and general counsel of administrative agencies and practitioners of administrative law, was created. After an intensive survey it came up with the suggestion that the President of the United States call a conference of representatives of all Government agencies having adjudicatory or rule-making functions, and direct them to take a look at their own procedures. The President did so. He directed the Attorney General to prepare a list of such agencies and to invite each to send a delegate. Fifty-six departments, bureaus and commissions were on the list. Besides the great independent agencies, the cabinet departments, and the great offices such as the Civil Service Commission, the Patent Office, and the Bureau of Internal Revenue, there were many other bureaus and sections dealing with vitally important subjects, such as immigration, food and drugs, veterans' affairs, social security, war claims, etc. The President directed that twelve members of the bar, three trial examiners, and three judges, all of whom he named, be included in the Conference. The roll totaled seventy-four delegates and members.

The agencies named top-flight representatives. When the Conference assembled, it was an interesting group, an encyclopedia

in human form of procedural federal law. If you wanted to know how such-and-such is done, or ought to be done, in an adjudicatory administrative proceeding, all you had to do was to listen patiently enough, and, without leaving your chair, you could hear authoritatively by admissible first-hand evidence how it is done everywhere in the whole vast reaches of the Federal Government. It was quite a sight.

There can be little doubt that the administrative agencies in Washington, generally speaking, had fallen into grievous habits in respect to their adjudicatory duties. The fault lay in many directions. In the first place the courts had contributed by holding that the rules of evidence did not apply and that an agency must receive any offering by a party. In the next place the practicing bar had contributed, because all too often the private party has the less desirable side of the controversy and the object of his counsel is confusion rather than clarity. After all, we cannot expect counsel, who are human beings, to exert great effort to make clear a point upon which his client is wrong, or to aid in hastening the day upon which his client is to receive bad news. In the third place the agencies contributed, because their regulatory, planning, semi-legislative functions absorbed the center of their interest, and the adjudication of disputes was cast into the penumbra of attention. The law schools contributed by failing to train law students in the craftsmanship of controversy and produced a generation of practitioners who knew the answers but had not the foggiest notion of how to reach them. And so hearings which should have run days were too often running months, were costing tens of thousands of dollars when they should have cost hundreds, and were producing thousands of pages to be read when a hundred or two would have sufficed.

To change all this is an exceedingly practical problem of many exceedingly practical parts. Pious platitudes and vociferous scolding are of exactly no value in the effort. The task concerns the actualities of adversary presentation, a matter as prosaic as bricklaying or assembling a motorcar. The trained, experienced mechanic, not the glib-tongued advertising man, makes an auto-

mobile run. The President's Conference was composed of exceedingly practical technicians, and they took an exceedingly practical view of their assignment. I suppose there was less oratory in the several sessions of that Conference than there has been in any meeting in Washington for many, many years.

The Conference promptly adopted an agenda of topics for study and divided itself into eight working committees. It held four plenary sessions, each lasting two days, and its committees held innumerable meetings. All of these sessions were in public, observed by such of the press as cared to attend. In November, 1953, the Conference adopted its First Report and broadcast it to all interested people and organizations, distributing some four thousand copies and seeking comment and suggestions from every available source. In October and November of 1954 it adopted its Final Report and adjourned *sine die*.

While the actions of the Conference were premised upon exhaustive committee reports and studies, the Conference itself considered and adopted only recommendations, which were succinct, usually one sentence, advisory suggestions in epitomized form. In the Report these appear in blackface print, a typographical indication of their designed nature.

No attempt was made by the Conference to tell any agency what to do—to impose rules, in other words. In fact the President told the Conference not to attempt that. This was a study-and-recommendation group. Its purpose was to discover what improvements could be made, call them to the attention of the agencies, and recommend that they be considered for adoption. The Conference itself stressed the fact that the problems of the several agencies differ so materially that each suggested general principle must be adapted to fit the particular problem.

One further word about the Conference itself—it was a new experiment in government. It was a cooperative self-examination by Government agencies themselves. Investigations and inquiries by outside groups, such as Congressional committees and such organizations as the Hoover Commission and its task forces, have important places which no one would deny or decry. A study from

outside the turmoil of actual operation has values which cannot be replaced by any other approach. But self-examination and self-criticism also have values which no other method can equal. Especially is this true in respect to a cooperative self-examination. Here were fifty-six agencies, widely differing in functions, organization and procedures, all looking at each other and at themselves and asking, "How can we improve ourselves?" I think no step has been taken which has produced the results achieved by the cooperative self-examination on the part of the federal courts. The same can be and, I venture to forecast, will be achieved in respect to the administrative agencies. They know first-hand what the problems are. Given support and encouragement from the top, which they received in this instance from the President, the Chief Justice, and the Attorney General, truly major results in good government are most certain. And especially is this true when the outside bar lends a hand. One or more of these private practitioners were on every committee of the Conference. They were tough troupers right out of the trenches of combat. They served in part as attackers and in part as defenders. They did a marvelous job in friendly albeit vigorous participation in all the goings-on. One notable characteristic of this feature of the Conference was that no Government-anti-Government viewpoints developed. On every issue upon which differences of opinion appeared, the Government delegates were divided and the bar delegates were divided.

The first and great achievement of the Conference is an imponderable. I think it is no exaggeration to say that Government agencies in Washington are becoming procedure conscious. I really believe that the executive agencies are today seeking ways and means of eliminating the unnecessary delay, expense, and volume of record which were becoming characteristic of administrative proceedings. We hear accounts of reductions in time of hearings, of reductions in printing costs, of intensive training of Government lawyers in trial techniques, and of sympathetic ears to the voices of the bar concerning procedural improvements. These are in part intangibles, but they are nonetheless real.

Now a short description of some of the recommendations of the Conference. Remember the assignment concerned long and complicated cases. Specific attention was not directed to the ordinary calendar. Whether some of the recommendations ought to apply generally is another problem.

The Conference adopted forty-four recommendations. Two were addressed to the President, three to the Judicial Conference, six to the Civil Service Commission, one to the General Services Administration, and twenty-two to the administrative agencies.

The Conference recommended to the President that he establish in the Department of Justice an Office of Administrative Procedure, which would have three principal duties: (1) to carry on studies of the procedure in all the Government agencies; (2) to collect and publish facts and statistics concerning those procedures; and (3) to assist the agencies and their respective bars in cooperative efforts to improve those procedures. The Conference took its cue from the Administrative Office of the United States Courts. As you know, that Office, under its Director, collects and publishes statistics, reports and recommendations concerning the business of the federal courts. Every federal court now knows exactly the state of the business in every other federal court. The compelling impulses flowing from that public knowledge are terrific. The same sort of results are sought among the administrative agencies. Such an office would be a cohesive force among the sprawling outfits that comprise the federal establishment. It would afford a ready channel of inquiry among them. It would be a continuing instigator of improvement. It would supply the powerful incentive of comparative statistics.

The other recommendation addressed to the President was in effect an endorsement of legislation sponsored by the Judicial Conference, looking toward the shortening of records on appeal in administrative cases. As you know, some statutes require that upon an appeal from an agency ruling the agency must send up to the court the entire record of the proceeding. Thus, if a single point of law is appealed from such an agency, the whole record, maybe a couple or more feet thick, must be prepared and sent up.

Of course little of it is printed in such a case, but its preparation is an enormous and wholly unjustified expenditure of time and money. The proposed legislation would permit the parties or the court to designate pertinent parts of the record to be sent up or, indeed, in an appropriate case to file no record at all.

Three recommendations were addressed to the Judicial Conference. I would call your attention to one, which was invented over at the Federal Power Commission. We all know that upon appeals lawyers delay to the last anguished moment the irretrievable decision as to what points are to be relied upon. Hence they delay, to one minute before midnight of the last day permitted by the printer, the final freezing of the text of the brief. And we all likewise know that, due to the same characteristics, when we require lawyers to designate the portions of a record to be printed before they actually print their briefs, they designate everything in the record which might conceivably, by the utmost stretches of the imagination, be useful when they finally decide what points to argue. The results are oftentimes staggering in the extent of the printed volumes, and equally staggering in the uselessness of so much of it. There is no use complaining about the illogic of this practice. It is one of the facts of law practice. The suggestion made by the Conference is quite simple. It is that upon appeals the briefs be printed, or at least put into proof, before instead of after the parties designate the portions of the record to be printed. This simple expedient, we have been told, has saved up to 75 per cent of printing costs in some cases. We have experimented with it in our circuit and are delighted with it.

A committee of the Conference made an exhaustive study of the costs of transcripts of testimony at hearings and came up with some interesting facts. One fact recited in the report of this committee was truly amazing to me. It was that a number of agencies using outside reporters engaged by contract put the contract up for cash bids and make an award to the highest bidder. Thus the litigants who must buy the transcripts pay for their copies and for the copies for the Government, and they must also pay enough extra to make whole the reporter for the price he paid the Gov-

ernment for the contract. Restricting itself to an unnecessary, but doubtless admirable, mildness of expression, the committee condemned that system as "particularly unjustified." The Conference made a whole series of recommendations on the subject of transcripts.

Of the twenty-two recommendations addressed to the agencies, a number were general in their nature—advocating such things as studies of procedure, definitions of the status of agency counsel in trial proceedings, the preparation of trial briefs, definite rules as to interlocutory rulings and appeals, the current indexing of records, the preparation and use of trial attorneys' manuals (a field in which the Federal Trade Commission has pioneered), the preparation of practice manuals, the use of in-service training and of lawyers' institutes, and conferences with the bar.

Current indexing of records in long cases is one of my pet hobbies. I suppose we have all had the experience of waking up along about the sixth day of a hearing knee-deep in those blue-backed volumes the reporters give us when we get copy twice daily. And we have all likewise had that nightmare of knowing perfectly well that last week some witness on the stand said thus-and-so, but mist envelops the who, the when, and the where. And in the same category in my book comes the post-hearing agony of drawing from a cold, unindexed record proposed findings or a statement of facts and keying same to said record. For all these ills a simple remedy exists. When the trial begins, assign to a fairly intelligent junior lawyer and a secretary the task of keeping on a set of index cards a topical index of what appears in the record, as fast as he gets the transcript. He will have to work nights, but the comfort and satisfaction of that little box of index cards is worth whatever price must needs be paid. Don't let the indexer put on his cards any attempted digest of evidence. Make him stick to topical indexing, and he will stay out of difficulty.

I do not know whether or not you have the joint appendix system in New York State. As we practice it in our court the appellant notifies the appellee of the portions of the record he pro-

poses to print, the appellee in turn gives notice of the additional portions he desires printed, and the appellant then prints the whole of the designated parts, either as an appendix to his brief or in a separate volume.

The Conference recommended the adoption of a pre-hearing conference practice by the agencies. Its objects are principally three—a crystallization of the issues to be heard, the elimination of unnecessary technical formalities in the presentation of proof, and the creation of a plan of procedure. The rule recommended is patterned upon the rule in the Federal Rules of Civil Procedure. It contemplates total informality in these preparations for formal hearings, and it contemplates a preliminary procedural order to govern the hearings.

The Conference supported four widely advocated rules of practice in respect to evidence. It recommended that the agencies require all documentary evidence to be submitted in advance of the hearing. It recommended that when a party proposes to use part of a document or book as an item of evidence he be required to prepare copies of the pertinent excerpt, submit them in advance, and then offer for the record only the excerpt. The third recommendation is that where feasible the parties be induced to agree to submit expert or opinion testimony in writing in advance of trial and then to admit the written statements to the record in lieu of oral examination, and that cross-examination be upon request and notice. The fourth recommendation on documentary evidence is that, when opinion testimony is based upon economic or statistical data, such data be made available to opposing parties in advance of trial, but that, except for items actually disputed, this underlying data be not offered for or received in the record.

The Conference recommended that courts encourage the agencies to exclude irrelevant material.

A committee of the Conference plowed deep into the matter of uniform rules and dug out a mass of original research material upon the subject. The feasibility of uniform rules for all administrative agencies is a topic which has long intrigued the idealists.

Procedural provisions universally applicable would indeed be profitable as well as pleasant for practitioners. But the possibility of such a Utopian coverall has equally dismayed the realists. The problems of the agencies differ as do the salts of a single element. Innocent though the presence or absence of one atom in a chemical compound may appear in the written formula, factually that atom may mean the difference between life and death. The Interstate Commerce Commission has before it the rates of a hundred railroads, the Labor Board the grievances of a thousand individual laborers, the Power Commission the depreciation of ten thousand miles of pipe or wire, the Communications Commission the intricacies of rapidly expanding sciences, the Securities and Exchange Commission the financial complexities of a network of corporate entities, the Civil Aeronautics Board the needs of the nation in the vast new transportation lanes of the sky, and so on. These dissimilar basic problems present dissimilar problems in procedure. And yet through the whole of this array of unlikes run threads of likes. Some uniformity would be helpful even if full uniformity be impractical. And so the Conference tackled that problem. It recommended to the agencies that, while uniform rules are neither desirable nor feasible in all matters, they are desirable and feasible in many matters. It recommended that the agencies study cooperatively for possible adoption uniform rules on a specific list of nine subjects, which were the computation of time, the service of process, subpoenas, depositions and interrogatories, official notice, presumptions, stipulations and admissions of record in proceedings involving numerous parties, the form and content of decisions, and appeals from intermediate decisions. The Conference even adopted illustrative rules on the subject as starting points for the recommended studies.

The Conference recommended a policy respecting the uniform identification of agency rules, uniform citations and references to agency rules, and uniform printing practices as to rules.

The Conference quickly recognized, as every researcher in the field quickly recognizes, that the key to efficiency in adjudicatory processes is the hearing officer. Just as the trial judge is the key

to efficiency in the judicial system, so the hearing officer is the key in the administrative system. If he is able, industrious and interested, the proceedings which he conducts move to their conclusions with accuracy, economy and expedition. But if he is incompetent, lazy or uninterested, all the rules and policies which any tribunal can adopt will not make that forum a place of effectiveness. Pre-hearing conferences, preparation of counsel, model pleadings, plans for hearings, rules of evidence are all so much academic exercise if there be not a competent official in the presiding officer's chair. The Conference also learned that, although the matter has been the subject of long debates and much writing, no exhaustive research job had ever been done on it so far as the Federal Government was concerned. And so a committee set about to do that research task. The program was little short of stupendous. The resulting report was complete.

The problem as to hearing officers has many facets. What should be the qualifications of hearing officers—as to professional background, as to age, as to experience, as to special fields of administrative problems? Where and how should they be recruited —at the bar? in the law schools? in the Government? How should they be selected, that is, how should their qualifications be evaluated so as to separate the qualified from the rest? Who should do this evaluating? Who should appoint hearing officers—the President? the Attorney General? the Civil Service Commission? the several agencies? an independent board? and independent official? Should hearing officers be officers of the several agencies or of a central office? Should they be assigned permanently to one agency, or should their assignments be temporary? What should be their tenure—for life? a term of years? at the pleasure of some official? and, if the latter, whom? For what reason and by what process should hearing officers be removed? How should they be promoted? How should they be classified—all alike or in grades? How should they be assigned—indiscriminately or selectively? These topics are enough to indicate that the subject is difficult, delicate, complex and confusing. Much is said about the necessity for independence on the part of hearing officers. And, of course,

when rights are being adjudicated it is essential that the evaluator of the evidence, the initial architect of the decision, should be independent of all predilections and pressures. The big problem is what to achieve in the way of independence and how to achieve it. The actual answer is not in a pious platitude but is composed of many small particles of commonsense material, such as appointment, tenure, classification, assignment, promotion, and the like.

The Conference committee split down the middle in its final report. Four of the eight members urged that the entire hearing officer problem be placed in the hands of an independent board to be appointed by the President. The other four members urged that the problem be left to the Civil Service Commission but be placed in a new division under the Commission, with appointments from both within and without the Government to a supervising board. The Conference debated the two reports with care, with considerable vigor, and at length. Finally, by a vote of 35 to 23, a recommendation was adopted favoring retention of the problem by the Civil Service Commission. At the next plenary session, a month later, a motion for reconsideration of the subject was debated for half a day and failed of adoption, receiving 30 votes against a needed 38 required by the rules of the Conference. The Conference adopted several specific recommendations respecting hearing examiners, dealing with qualification standards, recruitment, the career merit system, salary grades, and compensation. It was interesting that the Conference voted against a single grade for examiners, either in the Government as a whole or in any one agency.

The basic philosophy of the President's Conference was stated in the first recommendation it adopted. It is that unnecessary delay, expense, and volume of record in adjudicatory proceedings are detrimental to the public interest. The public interest, let us note, is what the Conference said—not merely the litigants' interest. If the Conference did no more than secure the acceptance of that thesis by Government agencies, it would have erected a milestone in the progress of government. It has long been an

accepted axiom in judicial processes that justice delayed is justice denied, and it is equally, although more recently, established that justice too costly to obtain is no justice. But the same simple truths have not been so clearly seen in the administrative field. So great a proportion of the time and effort of administrative bodies is necessarily devoted to rule-making for prospective applications, or to sweeping investigatory duties, that the needs of the person (individual or corporate) involved in a dispute which must be adjudicated in order that rights may be ascertained and fixed, have not had the major attention which they merit. The fact is that if the administrative agencies are to continue to adjudicate disputes concerning rights, they must recognize and apply those elements which have come to be, in our American thinking, essentials to that process. There was no voice in dissent when the declaration of the first recommendation was laid before the Conference. It was an important note in the cause of effectiveness in democratic government. President Eisenhower referred to it as a "purposeful declaration."

The final action of the Conference was to adopt a resolution suggesting to the President that he establish a permanent Conference, somewhat along the lines of this one, to meet once a year, or more often if need be, to exchange ideas and to make recommendations concerning administrative procedure. My own hope is that this will be done. It would be healthy, helpful government.

Of course the recommendations of this Conference will be debated whenever they are discussed; these are in major part debatable subjects. And I suppose the Conference itself will be described upon occasion in terms less flattering than those I have used in respect to it. I expect it will be said that this was a prosaic group, composed of workmen, lacking in great flights of imagination, not bold, plodding not soaring. And perhaps all that may be true. But I would like to close this paper with a word on behalf of the workmen in the field of practice. Trying a lawsuit is like playing quarterback on a professional football team. It looks different from what it feels like. I would be the last one to disdain or disregard a grandstand tactician. But I also have high regard

for the advice of the field general who has tasted the mud and handled the slippery ball. What I am trying to say is that the views of actual practitioners, public and private, in respect to improvements in the actual conduct of hearings and the disposition of disputes are of prime value. These men knew what they were talking about. What they said cannot be shunted aside merely because they knew these things firsthand. And, moreover, I am among those who believe that the basic principles of our adjudicatory procedure, modeled after our judicial processes, are sound. I see no sense in tearing down the whole house just because there is a hole in the roof. I say again what I said in the beginning, examinations of administrative procedure from the outside are valuable indeed, but so too are the cooperative self-examinations by the trial staffs of the agencies and their antagonist fellow workmen, the practicing bar.

Recent Decisions of the United States Supreme Court

by EDWIN M. ZIMMERMAN and JOHN D. CALHOUN

NORWOOD, ET AL. V. HON. WILLIAM H. KIRKPATRIC, ETC.

(April 11, 1955)

In May of 1949, the Supreme Court in *Ex parte Collett*, 337 U.S. 55, held that § 1404(a) of the Judicial Code rendered the doctrine of *forum non conveniens* applicable to actions under the Federal Employers Liability Act. Section 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Now, in this case, the *Norwood* case, the Supreme Court has concluded that § 1404(a) allows the trial judge broader discretion to void the plaintiff's choice of forum than would those tests traditionally applicable under the *forum non conveniens* doctrine.

The case arose when petitioners, three dining car employees, one a resident of Philadelphia, the others residents of Washington, D. C., filed separate suits in the United States District Court for the Eastern District of Pennsylvania, which sits in Philadelphia, claiming damages under the Federal Employers Liability Act for injuries sustained when a train of defendant was derailed near Dillon, South Carolina. Defendant moved to dismiss the actions, or, in the alternative, to transfer the cases to the division of the accident, the Florence Division of the Eastern District of South Carolina. The District Court denied the motions to dismiss, but, invoking 28 U.S.C. § 1404(a), granted the motions to transfer.

In reaching its decision, the District Court observed that if § 1404(a) codified the rule of *forum non conveniens*, transfer would have to be denied, but it concluded, because of the holding of the Court of Appeals for the Third Circuit in *All States Freight v. Modarelli*, 196 F. 2d 1010, that it must exercise a broader discretion under the statute than would be allowed under *forum non conveniens*.

Petitioners applied to the Court of Appeals for the Third Circuit for mandamus or prohibition to the district judge, requiring him to set aside his orders of transfer. The applications were denied by the Court of Appeals, and the Supreme Court granted certiorari. 348 U.S. 870.

The cases, consolidated for argument, are disposed of in a single opinion in which the Court (5–3, Mr. Justice Harlan not participating, and Mr. Justice Clark, with whom The Chief Justice and Mr. Justice Douglas concur,

dissenting) affirms the transfers and declines to pass upon the question of whether mandamus or prohibition is a proper remedy.

The majority, in an opinion by Mr. Justice Minton, adopts a syllogistic argument. It is urged that (1) a broader discretion should be allowed to a court when it is invoking a mild sanction than when it is invoking a harsh sanction; (2) the doctrine of *forum non conveniens* involves dismissal of an action, with the consequent risk that limitations provisions elsewhere may prevent its reinstitution, while § 1404(a) involves the relatively milder penalty of transfer of the cause; *therefore,* under § 1404(a), a trial court has discretion to transfer cases "without regard to the stringent requirements of *forum non conveniens.*" In the language of the Court, the argument runs:

> ". . . The harshest result of the application of the old doctrine of *forum non conveniens,* dismissal of the action, was eliminated by the provision in § 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. . . ."

But the Congress, when enacting § 1404(a), was not bound to adopt tests for the new law that were milder than, and, therefore, logically symmetrical with, those of *forum non conveniens.* Congress was free, if it desired, to perpetuate the traditional hurdles of *forum non conveniens* as the barriers to transfer under § 1404(a). And for the dissent that appears to be just exactly what Congress intended to do. Such Congressional intent is said to be implicit in the fact that: (1) the same Congress that adopted § 1404(a) (by way of the consent calendar, without debate on the floor, and after advice that the revision was a non-controversial codification) interred the Jennings Bill which sought to limit venue under the FELA; (2) all prior decisions of the Court have held that § 1404(a) rendered the doctrine of *forum non conveniens* applicable to FELA cases; and (3) the reviser's notes state that § 1404(a) "was drafted in accordance with the doctrine of *forum non conveniens.*"

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It is an extreme novelty in American law to deprive a plaintiff of his home forum in favor of the convenience of the defendant. This is particularly true in personal injury cases. The wisdom of the tradition is hardly challenged by a case in which a dubious "therefore" allows a peregrinating dining car attendant to press suit against a railroad only in South Carolina, far from his home.

WEBER V. ANHEUSER-BUSCH, INC.

(March 28, 1955)

Again the Court has had occasion to survey another piece of the boundary between federal and state jurisdiction over labor relations. This time at issue was the jurisdiction of a state court to enjoin conduct which violated a state statute against restraint of trade but also came within the ambit of the Taft-Hartley Act. The Supreme Court unanimously decided against the enjoining action of the state court. Justice Frankfurter wrote the opinion of the Court, which was joined by all but Justice Black, who concurred in the result, and Justice Harlan, who took no part in the consideration of the case.

Petitioner, a labor union, had successfully insisted that respondent company execute a collective bargaining contract which provided, in part, that when repair or replacement of machinery was necessary, the work would be given only to contractors with collective agreements with the union. A competing union protested against this clause. When a new contract had to be negotiated, respondent refused to agree to the insertion of the provision, negotiations were stymied, and the petitioner union went on strike.

Respondent promptly filed with the National Labor Relations Board a charge of an unfair labor practice against the union, under § 8(b) (4) (D) of the Taft-Hartley Act. That subsection labelled as an unfair labor practice a strike for the purpose of forcing an employer to assign particular work to employees in one labor union rather than another. The Board ultimately rejected the charge, reasoning that the union had not made demands for the assignment of particular work since no demands had been made on the only contractor used at the time of the strike—who, in fact, employed only members of the union.

Prior to the Board's action but after the strike began, respondent also sought an injunction in a state court on the grounds that the strike constituted a "secondary boycott" under state law, and also violated Subsections (A), (B) and (D) of § 8(b) (4) as well as § 303 (a) (1), (2) and (4) of the Taft-Hartley Act. A temporary injunction was issued. Subsequent to an amendment of the complaint to allege that an illegal common law conspiracy in restraint of trade existed, the temporary injunction was made permanent. This occurred before the decision of the National Labor Relations Board to reject respondent's charge.

On appeal, the Missouri Supreme Court held that the union's conduct violated the state's restraint of trade statute, and as such was enjoinable. The state Supreme Court's decision, handed down after the Board had acted, sought to resolve the question of a conflict with Federal legislation by concluding that the Board had held that no unfair labor practices were involved, and by characterizing the fact situation as a "jurisdictional quarrel between two rival labor unions" and hence "not a labor dispute within the Norris-LaGuardia Act, . . . the Wagner Act or the Taft-Hartley Act." Certiorari was granted.

Justice Frankfurter, writing for the Court, pointed out that Congress had given the Board responsibility for determining in the first instance whether there had been unfair practices in violation of Subsections (A), (B) and (D) of § 8(b)(4); that the Board had ruled only on (D); that the state court therefore usurped the function of the Board which, moreover, may well have deemed the conduct in question to be protected by the Act.

The fact that Missouri was prohibiting the union's conduct because the conduct was in contravention of a state law dealing with restraint of trade was not considered a distinction that saved the injunction. Precisely the same conduct was dealt with by similar remedies, one state and one federal, and to avoid conflict the state statute had to yield. *Garner v. Teamsters Union, 346 U.S. 485.* Moreover, in the event the conduct should eventually be found by the Board to be protected by the Taft-Hartley Act, the state clearly could not defend its intervention on the ground that its motive did not have to do with labor relations.

Justice Frankfurter recognized that in some cases it was difficult for state courts to determine whether a given subject was the concern exclusively of the federal Board. However, he did not regard this as such a case. "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES V. WESTINGHOUSE

(March 28, 1955)

The Taft-Hartley Act came before the Court again in this case, this time raising significant questions of federal jurisdiction, constitutional law, and labor policy, and resulting in opinions illustrating the judicial techniques by which significant questions of federal jurisdiction, constitutional law, and labor policy are avoided.

Section 301 (a) of the Act was under scrutiny. It provides, in part, that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any district court in the United States which has jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties.

The union had sued in a United States district court alleging that the respondent, Westinghouse, had violated the collective bargaining agreement then in force by failing to pay some 4,000 employees wages for a day on which they were absent from work for reasons other than furlough or leave of absence. The employees were not named and were not made parties to

the suit. The union asked that the contracts be interpreted, the rights of the parties declared, the respondent compelled to make an accounting, and that a judgment be entered against the respondent in favor of the individual employees for the unpaid wages.

On a motion to dismiss, the district court agreed to dismiss the complaint for failure to state a claim for relief. The district court reasoned that since the complaint did not affirmatively aver the cause of the absences from work, it was to be assumed that the absences were voluntary, in which case the bargaining contracts did not obligate the respondent to pay wages.

The Court of Appeals for the Third Circuit vacated the district court's order dismissing the complaint on the merits, and itself directed a dismissal for lack of jurisdiction. The court interpreted Section 301 as granting jurisdiction to Federal courts only over cases involving breaches of a collective bargaining contract between the union and the employer. The court decided, however, on the basis of an "eclectic theory" of law—which it felt empowered to shape because in its view § 301 created a federal substantive right—that the collective bargaining contract itself was not the contract of hire which required the employer to pay wages, and that the stated claim was for breach of the employment contract with the individual employees.

Certiorari was granted and the judgment of the Court of Appeals was affirmed. However, the Justices were so divided in their reasoning that no opinion of the Court could be rendered. Instead, Justice Frankfurter announced the Court's judgment, and set forth an opinion in which he was joined by Justices Burton and Minton, Chief Justice Warren and Justice Clark concurred in a short separate opinion, and Justice Reed concurred in yet another separate opinion. Justice Douglas wrote a dissenting opinion in which he was joined by Justice Black. Justice Harlan did not participate.

Justice Frankfurter began by examining the language of § 301 and deciding that, on its face, the provision merely furnished a Federal forum for cases involving breaches of collective bargaining agreements in which a labor union was a litigant. Turning next to the relevant legislative history, he found that the plain meaning of the statute was reinforced, and that § 301 was meant as a mere procedural provision and not as a means of creating a new body of Federal law.

This conclusion brought Justice Frankfurter to the brink of the question of the constitutionality of granting jurisdiction to Federal courts over a contract governed entirely by state substantive law. Two paths of retreat from this abyss were thereupon explored by Justice Frankfurter. The first involved removing constitutional doubts by ascribing to § 301 the creation of federal substantive rights, despite the absence of Congressional intent to create such rights. Justice Frankfurter stressed the danger in such a solution, and concluded that it did not "seem reasonable to view that section as a delivery into the discretionary hands of the federal judiciary, finally of this Court of such an important, complicated and subtle field."

Justice Frankfurter therefore turned to a second method of avoiding the serious constitutional question, namely by limiting the scope of the legisla-

tion. He accomplishes this by deciding that Congress did not intend by § 301 to burden the Federal courts with suits of the type now in question. Considering the constitutional difficulties which would be raised by a broader interpretation, and considering that the broader interpretation would bring into the Federal courts a wide range of litigation which heretofore had been entertained by the states, Justice Frankfurter felt that he could conclude that § 301 was not intended to apply to suits based on violation of the compensation terms in a collective bargaining agreement which accrued to the benefit of individuals, who had separate causes of action in the event of violation of the terms.

The three other concurring Justices were not willing to follow Justice Frankfurter down his long path of reasoning. For Chief Justice Warren, joined by Justice Clark, the disposition of the case was determined by the fact that neither the language of § 301 nor its legislative history indicated with clarity that Congress intended to authorize a union to enforce in a Federal court that personal right of an employee to compensation. They therefore, regarded it as unnecessary "for us either to make labor policy or to raise constitutional issues."

Justice Reed in his concurrence takes issue with Justice Frankfurter on the question of whether a serious constitutional problem was really involved. Justice Reed reasons that since Congress had legislative powers over labor matters affecting interstate commerce it could grant jurisdiction to Federal courts to try incidents of that activity, and could, moreover, dictate that state laws should be applied. The fact that state law might be applicable does not raise constitutional problems since the state law would be operative at the direction of and with permission of Congress, and would in effect be incorporated by reference.

Justice Reed concurred in the result, however, because he too believed that the claim for wages was based upon the separate contracts between the employer and each employee, and that the complaint did not allege a violation of the collective bargaining agreement which would make § 301 applicable.

Justice Douglas in his dissent states that Congress permitted Federal courts to fashion Federal rules for the construction of collective bargaining agreements. He dissents from the refusal of the majority to allow the unions standing to bring the suit. Analyzing the collective bargaining relationship, he considers it to include the adjustment of grievances. Justice Douglas therefore believes that the intention of the Act is best carried out by allowing the union to be the suing as well as the bargaining agency for its members.

* * *

The question of what substantive law governs a suit appropriately brought under § 301 is still unresolved. Only three members of the Court clearly hold that no Federal common law was contemplated. Chief Justice Warren and Justice Clark are uncommitted; apparently Justice Reed and clearly Justices Black and Douglas are committed to the idea that Federal

substantive rights have been created by § 301. The particular case has been disposed of. The difficulties and the points of conflict are still to be resolved.

AMALGAMATED CLOTHING WORKERS V. RICHMAN BROTHERS

(April 4, 1955)

Faced with conduct similar to that dealt with in the *Anheuser-Busch* case, the Court in this case had to decide whether a union being sued in a state court on conspiracy and restraint of trade grounds could secure from a United States district court an injunction requiring the termination of proceedings in the state court. Both a district court and the Court of Appeals for the Sixth Circuit held that the issuance of such an injunction was prohibited by 28 U.S.C. § 2283. That section provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Certiorari was granted and the Supreme Court affirmed. The Chief Justice and Justices Black and Douglas dissented in two opinions.

Justice Frankfurter wrote for the Court, and reading § 2283 strictly, concluded that there was no exemption to the prohibition against the issuance of an injunction. He found that none of the specific exemptions were applicable; and he regarded the statutory reference to specific exemptions as preventing the interpolation of an implicit exemption for cases where a state court may have been completely without jurisdiction because of having invaded a field preempted by Congress.

The result of the decision is that the union, objecting to the injunctive proceedings in the state court, must go up the state appellate ladder, and from there, if needs be, to the Supreme Court for relief.

The possibility that the federal scheme of regulation of labor disputes would be disrupted by this time-consuming requirement did not impress Justice Frankfurter. He was confident that federal rights would be protected adequately in the state courts. Nor did he think that misapplication of Supreme Court opinions or delays in litigation were peculiar to state courts.

The dissent of the Chief Justice argues that the legislative history of § 2283 makes it clear that an injunction can issue when Congress preempted jurisdiction to the exclusion of state courts. The dissent of Justice Douglas argues that unless an exception be read into § 2283 for a case such as this, the federal scheme of regulation was severely upset. By the time a state case has gone up the appellate ladder, the state injunction against a strike may have done its work.

Experience should soon prove whether Justice Frankfurter's optimistic confidence in state courts is justified, in this area. Presumably, if his expectations are disappointed, Congressional action will be necessary to preserve the efficiency of the federal regulatory scheme.

The Library

SIDNEY B. HILL, *Librarian*

RECENT SELECTED MATERIAL ON THE FEDERAL LOYALTY-SECURITY PROGRAM

"When justice and authority are united in government, then the ways and means of loyalty may find expression in that full measure of liberty which is the end for which loyalty exists."

CHARLES E. MERRIAM

President Allen T. Klots has announced the creation of a special committee of this Association to study the Federal Loyalty-Security Program.

This committee expects to review the entire Federal Security program with "full recognition of the paramount need of national security and at the same time the importance of preserving the traditional rights of the individual citizen."

In addition to the fact-finding study of case material which is elsewhere being prepared for the committee's use, the library staff has attempted to obtain for the library collection, as complete as possible, material that may be pertinent to such a study.

This includes not only the reports and treatises which resulted from the loyalty investigation of federal employees but in addition, any literature dealing with private company employment wherein federal-security is involved.

Gifts to the Library of books, pamphlets and monographs on all phases of the problem will be deeply appreciated.

The following selected check list of publications dealing with national security and rights of the individual has been prepared for the Committee and as a handy reference guide for others in pursuit of an answer to the vexing problem of loyalty investigation.

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